

- (a) for money borrowed in connection with the financing of the Network; or
- (b) for the value of goods or services rendered or received to develop, construct or operate the Network, the repayment of which is secured by the Network or any part thereof (including without limitation Company's and S&W's interest in this Agreement, Total Revenues or Permits); or
- (c) for money borrowed to refund Project Debt earlier incurred; or
- (d) evidenced by obligations issued by Company, on a parity of lien with any Project Debt or obligation refunding Project Debt.

Section 2.52 Punch List. The term "Punch List" shall mean an itemized list of minor construction corrective work not affecting the normal, uninterrupted, safe and beneficial use by the State of the Phase or Construction Segment of the Network in question, and not affecting the operation of the same in accordance with the Performance Standards.

Section 2.53 Regulatory Approval Delay. The term "Regulatory Approval Delay" shall mean one or both of the following:

- (a) A delay in obtaining one or more Regulatory Approvals caused by factors beyond the reasonable control of Company and S&W; or
- (b) A lawsuit filed under the authority of the Minnesota Environmental Rights Act, Minn. Stat. §115B, concerning the Network, or filed challenging one or more Regulatory Approvals, until such time as any such lawsuit is finally and ultimately resolved or completed, provided that the existence of such a lawsuit shall constitute a Regulatory Approval Delay only so long as the State, Company or S&W is actively pursuing resolution of the lawsuit (provided that this provision does not obligate State or the State Attorney General or Company or S&W to engage in any such lawsuit except as otherwise expressly provided in this Agreement).

Section 2.54 Regulatory Approvals. The term "Regulatory Approvals" shall mean all local, regional, state and federal agreements, studies, findings, permits, approvals, certifications, licenses and other authorizations required to be obtained or completed under applicable Laws and Regulations prior to undertaking any particular activity contemplated by this Agreement. Regulatory Approvals include Permits.

Section 2.55 Right of Way. The term "Right of Way" shall mean the real property, including all fee simple, easements, access rights, rights of use and other interests, owned and/or operated by MnDOT, devoted to State Trunk Highway purposes and needed for the design, construction, maintenance, repair and operation of the Network in the specific locations shown on Exhibit A.

Section 2.56 S&W. The term "S&W" shall mean Stone & Webster Engineering Corporation, a Massachusetts corporation, and its successors and permitted assigns.

Section 2.57 S&W Default. The term "S&W Default" shall have the meaning set forth in Section 16.1.

Section 2.58 S&W Guaranty. The term "S&W Guaranty" shall mean the guaranty of completion and performance and warranty against defects which S&W is to execute and deliver pursuant to Section 5.8(e).

Section 2.59 S&W Party. The term "S&W Party" shall mean and include S&W and any partner, director, officer, employee, agent, contractor (other than Company), subcontractor at any tier or any other representative of S&W. The term "S&W Party" does not include Company.

Section 2.60 Schedule of Performance. The term "Schedule of Performance" shall mean the schedule of key milestone dates set forth in Exhibit F attached to this Agreement, as the same may be amended by mutual agreement of the parties or extended pursuant to this Agreement.

Section 2.61 Security Instrument. The term "Security Instrument" shall have the meaning set forth in Section 18.1.

Section 2.62 State. The term "State" shall mean the State of Minnesota, acting by and through the Commissioner of MnDOT or the Commissioner of DOA.

Section 2.63 State Default. The term "State Default" shall have the meaning set forth in Section 16.4.

Section 2.64 State Indemnatee. The term "State Indemnatee" shall mean and include the State of Minnesota, the Commissioner of MnDOT, the Commissioner of DOA, the Minnesota Attorney General, and all elected representatives, appointed officials, commissioners, officers, members, employees, agents, consultants and representatives of any of them.

Section 2.65 State Major Change. The term "State Major Change" shall mean a Network extension, enhancement, change in location or other change in Network architecture or Equipment configuration as compared to that shown on approved Plans and Specifications which (a) is requested in writing by the State after Plans and Specifications are approved or deemed approved under Section 5.4(c), (b) requires capital investments or improvements and (c) causes individually or cumulatively an increase in the cost of the work in excess of \$100,000; provided that none of the foregoing constitutes a State Major Change if the same (i) is required of Company in order to cure a material omission in Plans and Specifications as compared to the Network architecture and Equipment set forth in Exhibit A, or in order to comply with the Performance Standards, Laws and Regulations, the Utility Accommodation Policy or Regulatory Approvals, (ii) is within the \$5 million worth of ITS and TMC-related work and services to be provided pursuant to Section 3.3(e) or (iii) is a relocation of the Network governed by Section 11.2.

Section 2.65 State Project Manager. The term "State Project Manager" shall mean the State official designated from time to time to manage this Agreement for MnDOT and DOA.

Section 2.66 State Trunk Highway. The term "State Trunk Highway" shall mean any highway designated from time to time as a State Trunk Highway pursuant to Minnesota Statutes Ch. 161. State Trunk Highways include Freeways.

Section 2.67 Substantial Completion. The term "Substantial Completion" shall mean the completion of construction and equipping of a Construction Segment in accordance with the Plans and Specifications, all applicable design and construction standards under this Agreement and the terms of Section 5.3, subject only to completion of Punch List items.

Section 2.68 Substituted Entity. The term "Substituted Entity" shall mean any person or entity selected by the Lender and approved by State in accordance with this Agreement to perform the obligations and succeed to the rights hereunder of Company and/or S&W, as the case may be, after any such Lender has acquired Company's or S&W's rights hereunder by or in lieu of the exercise of remedies under a Security Instrument.

Section 2.69 Technology Upgrade Fund. The term "Technology Upgrade Fund" shall mean the fund by that name created pursuant to Section 12.2.

Section 2.70 Term. The term "Term" shall mean the time period commencing on the Agreement Date and expiring 30 years after the last Acceptance Date for the entirety of Phase 1 of the Network, provided that:

(a) if the last Acceptance Date of Phase 1 of the Network does not occur within 21 years from the Agreement Date, then the Term hereunder shall expire 21 years from the Agreement Date; and

(b) the Term is subject to earlier termination in accordance with this Agreement.

Section 2.71 Testing Requirements. The term "Testing Requirements" shall mean all the systems testing and integration criteria, standards, specifications and procedures prepared and compiled in accordance with Section 6.2. Testing Requirements include the "Testing Criteria" and the "Testing Procedures" described in Section 6.2.

Section 2.72 TMC. The term "TMC" shall mean the Traffic Management Center operated by MnDOT, where, among other activities, roadway and traffic information supplied by remote video cameras and other means is collected, retrieved, analyzed, monitored, responded to and disseminated for traffic management purposes.

Section 2.73 Total Revenues. The term "Total Revenues" shall mean, for any Fiscal Year, all revenues actually received by Company in connection with the Network, including, without limitation, gross revenues from User Agreements except for User Agreements with Collocating Customers, other revenues from the Network or the users thereof, business

interruption insurance proceeds and interest earned on balances of the Maintenance Fund, but excluding any amounts to be received by Company constituting proceeds of Project Debt or constituting payments from or in connection with Collocating Customers.

Section 2.74 User Agreements. The term "User Agreements" shall mean any and all contracts and agreements, except this Agreement, under which Company provides either (a) rights of use of or access to the Network to others or (b) rights to Collocating Customers to own and operate fiber optic cable and equipment that is separate and distinct from, collocated with, and installed concurrently with Company's installation of, the Network.

Section 2.75 Utility Accommodation Policy. The term "Utility Accommodation Policy" means collectively (a) the rules, manuals and guidelines as modified and attached to this Agreement as Exhibit H, consisting of marked versions of (i) Minnesota Rules Sections 8810.3100 through 8810.3600, (ii) MnDOT Policy Manual Section 90-1 (Position Statement, Highways No. 90-1, Accommodation of Utilities on Highway Right of Way, dated July 27, 1990), (iii) MnDOT Policy Manual Section 90-1-G-1 (Guideline, Highways No. 90-1-G-1, Permits for Accommodation of Utilities on Highway Right of Way, dated July 27, 1990), and (iv) MnDOT Policy Manual Section 90-1-P-1 (Highways No. 90-1-P-1, Procedures for Accommodation of Utilities on Highway Right of Way, dated July 27, 1990), and (b) any additions or amendments thereto and substitutions therefor; except for additions and amendments which are inconsistent with the terms of this Agreement and are not necessary in MnDOT's good faith opinion to address substantial safety concerns.

ARTICLE III GRANT OF RIGHTS; OBLIGATIONS; TERMS OF BARTER

Section 3.1 Grant of Rights to Develop Network; Term.

(a) Subject to the limitations and conditions set forth in subsections (b) and (c) below and otherwise in this Agreement, State hereby grants to Company and S&W the right and opportunity to design, finance, construct, install, own, operate, use, administer, maintain and replace the Network, to construct, install, use, administer, maintain and replace the fiber optic cable and equipment of Collocating Customers and to enter into User Agreements respecting the Network and/or Collocating Customers.

(b) The exercise of Company's and S&W's right granted in subsection (a) above to construct, install, operate, use, administer, maintain and replace is limited and conditioned by, among other provisions set forth in this Agreement, the following:

(i) Company's and S&W's compliance with any restrictions or requirements MnDOT reasonably applies at the time any such right is exercisable and exercised in order to protect or promote the safety and operation of Right of Way in which the Network is located or the safety and convenience of the traveling public;

(ii) the nature and condition of MnDOT's title to Right of Way in which the Network is located, as it may change from time to time, including but not limited to rights held by others to possess, control and utilize the same to the extent permitted by Laws and Regulations or any agreement, easement, franchise or other title instrument, with the benefit, however, of Sections 11.1 and 14.1(c);

(iii) the paramount right of MnDOT to possess, control and utilize Right of Way as permitted by Laws and Regulations, including but not limited to the right to grant Permits to others pursuant to the Utility Accommodation Policy, with the benefit, however, of Sections 11.1 and 14.1(c) and the provisions on relocation set forth in Section 11.2;

(iv) the satisfaction of any requirements applicable under MEPA, NEPA or either of them and the receipt of and compliance with the terms and provisions of all Regulatory Approvals necessary for the exercise of such right;

(v) Company's satisfaction of the conditions precedent to construction set forth in Section 5.5, as to Phase 1 of the Network, and Section 5.6, as to any Construction Segment in Phase 2 of the Network;

(vi) Company's and S&W's compliance in all material respects with this Agreement and the Laws and Regulations; and

(vii) Company shall have the right to use the Right of Way only and solely for the purpose of constructing, installing, owning, operating, administering, maintaining and

replacing the Network and constructing, installing, administering, maintaining and replacing the fiber optic cable and equipment of Collocating Customers, and shall have the right to use the Network only and solely for the purpose of providing to State and to telecommunications service providers, including Company Related Parties, transport capacity, via lit or dark fibers and ancillary services for voice, video and data transport and transmission intrastate and interstate.

(viii) Unless State otherwise agrees in writing in its sole discretion, Company shall not acquire or exchange fiber strands on Collocating Customer facilities and shall not purchase, resell or use the lit or dark capacity of Collocating Customer facilities until after all lit and dark capacity of the Network is fully utilized.

(ix) A Company Related Party shall have the right to purchase, resell or use fiber strands on Collocating Customer facilities or the lit capacity of Collocating Customer facilities (1) only after all lit and dark capacity of the Network is fully utilized or (2) before all lit and dark capacity of the Network is fully utilized, only on the following terms and conditions:

(A) Company shall first submit to State reasonably detailed information on the proposed arrangements for purchase, resale and use, including but not limited to the identity of the Company Related Party, the nature of the relation or affiliation, the purpose, type, scope and duration of the proposed use, the purchase and resale arrangements, if any, the architecture, design and other technical information concerning the fiber optic cable and equipment to be purchased or used and any other information State reasonably requests;

(B) State and Company shall thereafter meet and confer with respect to the proposed purchase, resale or use and its purposes; and

(C) the proposed purchase, resale or use shall be subject to State's prior written approval, in its good faith discretion, based on its evaluation of whether the proposed purchase, resale or use may have the purpose or effect of circumventing the State's right under Section 3.3(b) or (i) to share in future lit capacity of the Network. In making such evaluation, State shall consider such factors as the economic and technical practicability of providing the lit capacity on the Network, the nature and extent of the relation or affiliation with Company, the nature of the Company Related Party's business, timing, reasons and justifications for the purchase, resale or use of Collocating Customer facilities or capacity in lieu of the Network, suitability of the Network for the proposed use, comparative reliability, comparative fiber quality and the like; and

(D) State's decision shall be subject to review by the court in accordance with Section 16.7.

(c) Company's and S&W's rights under this Agreement shall terminate at the expiration or earlier termination of the Term, as more particularly set forth in this Agreement.

Section 3.2 Obligations to Develop Network and Provide Services.

(a) Prior to Commencement of Construction of Phase 1, Company and S&W shall have no obligation to construct or operate the Network or to provide to State the services set forth in Section 3.3. However, Company and S&W shall be obligated to use good faith and diligent efforts to satisfy, within the relevant times set forth in the Schedule of Performance (as the same may be extended pursuant to this Agreement), all conditions precedent to their right to commence construction of Phase 1 as set forth in Section 5.5; and State shall have the right to terminate this Agreement and Company's and S&W's rights hereunder if Company or S&W do not meet any pre-construction milestone set forth in the Schedule of Performance (as the same may be extended pursuant to this Agreement).

(b) Subject to the terms and conditions of this Agreement, upon Commencement of Construction of Phase 1 or any Construction Segment thereof, Company and S&W shall be obligated to construct and complete the entirety of Phase 1 and to provide to State the capacity, services and other consideration set forth in Sections 3.3 (except Section 3.3(i)).

(c) Subject to the terms and conditions of this Agreement, upon Commencement of Construction of any Construction Segment of Phase 2, Company shall be obligated to construct and complete such Construction Segment and to provide to State the capacity, services and other consideration set forth in Section 3.3(i) respecting such Construction Segment.

(d) Company shall provide or cause to be provided all operation, administration, maintenance, repair and replacement services for the Network throughout the Term, in accordance with and subject to the standards, terms and conditions set forth in this Agreement.

(e) The totality of S&W's obligations owing to State in connection with the Network are limited to those set forth in this Agreement and the S&W Guaranty.

(f) After all notices of Acceptance are issued for Phase 1, State shall have no further obligation to deliver to S&W any notices, documents, materials or information which State would otherwise be required to deliver pursuant to this Agreement, except with respect to any continuing obligations of S&W described in subsection (e) above.

Section 3.3 Network Capacity and Services to be Provided to State. In exchange for the rights granted to Company and S&W in Section 3.1 and elsewhere in this Agreement, Company (and S&W, but only to the extent of the services of S&W expressly provided in this Section) shall provide to State, without any charge, cost or expense whatsoever to State except as expressly provided in this Section, the capacity and services set forth in this Section.

(a) Initial Lit Capacity.

(i) Company shall create and continue to provide from and after the first Cutover Date for Phase 1 and thereafter throughout the Term, as part of Phase 1 of the Network, the amount of lit capacity described in Exhibit A attached to this Agreement.

(ii) An average of 20% of such lit capacity and up to 30% of lit capacity on any particular portion of Phase 1 of the Network shall at all times be available to State.

(iii) The State's share of such lit capacity shall at all times be provided through a single terminating Equipment at each of the 13 MNet hubs (including the disaster recovery hub) described and delineated on Exhibit A and the 17 MnDOT regional offices described and delineated on Exhibit A. The terminating Equipment shall be capable of supporting DS1, DS3, OC3, OC3c, OC12 or OC12c interfaces as necessary to meet the State's needs. Company shall deliver such lit capacity at standard cross-connect Equipment points (e.g. DSX1, DSX3 or OCn) at each such site to interface with State-provided equipment or State-procured local and inter-exchange carrier facilities.

(b) Future Lit Capacity.

(i) Within 30 Days after any date that Company adds lit capacity to Phase 1 of the Network or any Node or Nodes thereof in addition to that to be created pursuant to subsection (a)(i) above, Company shall notify State in writing of such action. From and after the date such additional lit capacity is placed in service, throughout the balance of the Term, State shall have the irrevocable and exclusive right to an average of 20% of such additional lit capacity and up to 30% of such additional lit capacity on any particular ring of Phase 1 of the Network.

(ii) State's right to its share of additional lit capacity includes capacity created by virtue of placing additional fiber strands in service, by virtue of increasing the capacity of Equipment already serving lit fiber strands on the Network or by virtue of technology upgrades. In either case, Company shall deliver State's share of the additional lit capacity via the existing rings connecting the MnDOT and MNet sites and via existing or upgraded terminating equipment at the MnDOT and MNet sites which support the interfaces identified in subsection (a)(iii) above; provided that State may elect to utilize its share of such additional lit capacity at or through any other Nodes or terminating points (such as but not limited to the locations described in subsection (f) below).

(iii) In order to protect and preserve State's right to future lit capacity under this subsection (b), Company shall not at any time sell, lease, license or otherwise transfer as dark fiber more than 80% of the remaining fibers in any ring of Phase 1 of the Network, unless State in its sole discretion approves an alternate means to assure to State acceptable quantities of future lit capacity by electronic upgrades to existing lit fiber. For this purpose, "remaining fibers" means the total number of fibers in the ring (excluding any added pursuant to Section

5.1(e)(ii)) minus (A) the strands to be lit as part of the initial lit capacity and (B) the ten dark strands reserved for the State under subsection (c) below.

(c) Dark Fibers. In addition to all lit capacity, Company shall deliver to State on each Cutover Date respecting Phase 1 a total of ten dark fiber strands on each ring and at all locations throughout Phase 1 of the Network. In those locations of the Network where rings converge or intersect, State shall receive a number of dark fiber strands equal to the number of the converged or intersecting rings times ten. State shall have the exclusive ownership, control and use of ten dark fiber strands on each ring for all the purposes set forth in Section 3.4 throughout the balance of the Term. Company shall make the dark fiber strands accessible to connect to State-provided equipment located in Network huts and pedestals and at the 13 MNet and 17 MnDOT sites set forth in Exhibit A. Dark fiber provided hereunder shall not be included in the computation of capacity for purposes of subsections (a) and (b) above.

(d) Right to Procure Additional Capacity. If at any time during the Term State desires to add capacity to the share of capacity of Phase 1 of the Network to which the State is then entitled under subsections (a), (b) and (c) above, then the following terms and conditions shall apply.

(i) State shall deliver to Company written notice setting forth in reasonable detail the additional capacity desired, whether it is desired as lit capacity or as dark fibers, the location or locations thereof and other necessary technical information.

(ii) If State has requested dark fibers, Company shall, within 15 Days after receiving the written notice, deliver to State a written notice stating whether the dark fiber desired is available and, if so, Company's then existing most favored customer rates and charges for dark fibers on such locations of the Network.

(iii) If State has requested lit capacity, Company shall within 15 Days after receiving the written notice, deliver to State a written notice stating whether it is offering or providing lit capacity to customers and, if so, Company's then-existing most favored customer rates and charges for lit capacity on such locations of the Network, and Company's schedule for procuring and installing the necessary Equipment and any other improvements for creating such additional lit capacity and for conducting and completing tests thereof.

(iv) To the maximum extent permitted by law, State shall have the right to the requested additional capacity at the following rates and charges:

(A) for additional lit capacity up to an amount equal to State's share of initial lit capacity under subsection (a) above and for additional dark fiber strands up to State's number of dark fiber strands under subsection (c) above, at 80% of the Company's most favored customers rates and charges; and

(B) for additional lit or dark capacity beyond the foregoing respective amounts, at 80% of the Company's rates and charges for similarly situated customers.

The most favored customers rates and charges shall consist of the lowest rates and charges Company is then receiving for dark fiber or lit capacity, as the case may be, from among its existing customers with contracts of comparable duration, inclusive of discounts for volume or other reasons. If there are no existing customers at such time, then the most favored customer rates and charges shall consist of the lowest rates and charges then shown on Company's schedule of rates and charges described in Section 7.7 for contracts of comparable duration. Rates and charges applicable to State shall be subject to change during the contract term to the same extent, and only to the same extent, as required of the most favored customers or similarly situated customers, as the case may be, having contracts of comparable duration.

(v) If lit capacity is requested and available, Company, in cooperation with State, at State's expense and in accordance with normal business practices, shall promptly and diligently prepare Plans and Specifications for necessary Equipment, Equipment configurations and related improvements, which Plans and Specifications shall be subject to State's written approval, not to be unreasonably withheld. Company shall make all changes to the Plans and Specifications which State reasonably requests.

(vi) If dark fiber is requested and available and if State approves in writing the rates and charges therefor, then Company thereupon shall deliver the dark fiber capacity to State on the terms set forth in this subsection (d).

(vii) If lit capacity is requested and available, if State approves in writing the rates and charges therefor, and State approves in writing the applicable Plans and Specifications therefor, then Company thereupon shall immediately and diligently proceed to procure and install any required Equipment and other improvements in accordance with such Plans and Specifications and the provisions of Sections 5.3 and 5.8(d), (f), (h) and (i), which shall apply to such work, shall undertake the procedures for Substantial Completion, testing, cutover and Acceptance in accordance with the provisions of Article VI, which shall apply to such work, and upon successful testing shall cutover service and deliver the lit capacity to State.

(viii) State shall have exclusive ownership, control and use of any additional capacity procured under this subsection (d) for all the purposes set forth in Section 3.4.

(e) ITS and TMC.

(i) In addition to the design and construction of Phase 1 of the Network, if Company and S&W commence construction of Phase 1, Company and S&W shall provide up to \$5 million worth of design and construction services for installing fiber optic cable, Nodes and related Equipment for MnDOT ITS applications, for interconnecting ITS applications with the TMC and/or for accommodating other MnDOT uses and needs. Company and S&W are obligated to procure and install only Equipment of the type included in the Network design. MnDOT may elect to provide some or all of the design and engineering work rather than use the design and engineering services of Company and S&W. Company and S&W shall have no

liability, by way of warranty or otherwise, for design and engineering work MnDOT elects to perform.

(ii) Company and S&W shall provide such services according to the schedule described in Section 10.5(b). Prior to Commencement of Construction for Phase 1, State, Company and S&W shall negotiate in good faith milestones for commencing liquidated damages for failure to achieve Substantial Completion, required test results and delivery to State of designated portions of such ITS and TMC work and a related schedule of per diem liquidated damages. The agreed-upon milestones and schedule of liquidated damages shall be set forth in a written modification to this Agreement. The milestones and schedule of liquidated damages shall be subject to the approval of State, Company and S&W, each in its good faith discretion.

(iii) MnDOT shall determine and advise Company and S&W of the routes and locations for the fiber optic cable, Nodes and related Equipment and provide Company and S&W with basic design criteria in connection therewith. MnDOT shall provide such information in sufficient time to allow Company and S&W to perform necessary design and engineering (which MnDOT does not elect to perform itself) and to prepare Plans and Specifications therefor consistent with their schedule for Commencement of Construction of Phase 1. If MnDOT does not elect to perform design and engineering work itself, then upon receipt of such information, Company and S&W, in cooperation with MnDOT, shall promptly and diligently prepare Plans and Specifications for the same, which Plans and Specifications shall be subject to MnDOT's written approval, which shall be based on the requirements set forth in Sections 5.3(a) and (b). Company and S&W shall make all changes to the Plans and Specifications which MnDOT requests.

(iv) Company shall price such design and construction services as follows:

(A) where the subject improvements are to be collocated with other portions of Phase 1 or Phase 2 of the Network, at the lesser of (I) Company's Incremental Cost, using the unit prices or other pricing mechanisms for the work under this subsection (e) set forth in the Key Contract between Company and S&W or (II) actual cost of S&W, including reasonably allocated wages, salaries, compensation and overhead of staff and employees, plus a profit equal to 5% of such actual costs;

(B) where the subject improvements are not to be collocated with other portions of Phase 1 or Phase 2 of the Network, at actual cost of S&W, including reasonably allocated wages, salaries, compensation and overhead of staff and employees, plus a profit equal to 5% of such actual costs; and

(C) for subject improvements in excess of \$5.5 million (as priced under items (A) and/or (B) above, as applicable), at the rates and charges established under the Key Contract between Company and S&W for comparable work and materials.

(v) Concurrently with its submission to MnDOT of Plans and Specifications (if not sooner provided under the Key Contract between Company and S&W), Company shall

submit to MnDOT a detailed pricing proposal for the requested improvements and such evidence as MnDOT reasonably requests of Company's and S&W's compliance with the pricing methods required under subsection (e)(iv) above. Company and S&W also shall submit modifications to the pricing proposal in connection with any changes to the Plans and Specification which MnDOT requests. Any disputes regarding pricing shall be resolved by the applicable dispute resolution mechanisms set forth in Section 16.7.

(vi) If the pricing finally established exceeds \$5 million, MnDOT either shall change the scope of the work to eliminate the excess or approve the Plans and Specifications and pricing for the subject work and pay the excess according to the pricing under subsection (e)(v) above. Payments of any such excess shall commence only after the first \$5 million of work and services are satisfactory performed. Payments of any such excess shall be subject to State's standard rules and procedures for payment for construction services, including but not limited to a 10% retention payable within 30 Days after all work is completed and accepted.

(vi) Upon MnDOT's written approval of the Plans and Specifications and pricing proposals, Company and S&W shall immediately and diligently proceed to construct the improvements in accordance with such Plans and Specifications and the provisions of Sections 5.3 and 5.8(d), (f), (h) and (i), which shall apply to such work, shall undertake the procedures for Substantial Completion, testing, cutover of service and Acceptance in accordance with the provisions of Article VI, which shall apply to such work, and upon successful testing shall cutover service and deliver such improvements and the capacity thereof to MnDOT.

(vii) State shall have exclusive ownership, control and use of the capacity of such improvements for all the purposes set forth in Section 3.4.

(f) Rest Areas, Travel Centers, Local Facilities and Mn/ROAD Site. Company and S&W shall provide, as part of Phase 1 of the Network, pull boxes and fiber optic cable at 34 of the 39 roadside rest areas, travel information centers, local motorist information facilities and Mn/ROAD site set forth in Table D of Exhibit A and, if any Optional Phase 1 Route is constructed, at each of the roadside rest areas and travel information centers along such route set forth in Table E of Exhibit A. Prior to Commencement of Construction, State shall select, in its sole discretion, which 34 of the 39 locations shown in Table D of Exhibit A are to be served and deliver to Company and S&W written notice of its selections. Pull boxes shall be located conveniently to serve each of the 34 selected locations. Fiber cable for each cross-roadway area shall be run to the boundary line of such area with an approximate count of 12 dark fibers.

(g) Equipment Huts and Pedestals. Company and S&W shall construct and provide equipment huts and pedestals at each Node of Phase 1. The equipment huts and pedestals shall be sized at least to the dimensions set forth in Exhibit A. Company shall identify in the Plans and Specifications the space in each equipment hut and pedestal to be used for placement of Equipment or the equipment of Collocating Customers or State to be installed as part of Phase 1 construction. Company shall dedicate approximately 20% of the equipment mounting space for State equipment (not to be less than one equipment cabinet in huts and one rack section in

pedestals). Company shall, in locating its Equipment, seek to accommodate State's anticipated use. If despite such accommodation and the foregoing required dedication of equipment mounting space for State equipment there is insufficient space in any hut or pedestal to locate State's equipment, State and Company shall re-design such hut or pedestal to increase its size to accommodate both State's and Company's use; and State shall pay to Company the Incremental Cost for sizing of huts and pedestals beyond the size set forth in Exhibit A in order to accommodate State's equipment.

(h) Equipment Purchases. State shall have the right, but not the obligation, throughout the Term, to purchase telecommunications equipment from or through Company. Whenever State exercises this right, the price charged to State shall equal Company's Incremental Cost for such equipment. State reserves the right to purchase equipment from vendors other than Company's vendors. Purchasing through Company does not invoke any warranties by Company or S&W.

(i) Phase 2 Capacity. If Company elects in its sole discretion to construct or add to the Network any portion of Phase 2, then:

(i) Company shall provide to State an average of 10% of all existing and future lit capacity thereof, and up to 20% of all existing and future lit capacity thereof on any particular route, subject to the following terms and conditions:

(A) State's 10% share of such capacity shall consist of both physical capacity, including but not limited to conduit innerducts and equipment mounting locations, and electronic capacity, including that of fiber optic cable and Equipment;

(B) Company shall be required to provide such capacity only with respect to fiber which is interconnected electronically or optically to Phase 1;

(C) State's right to its share of future lit capacity includes capacity created by virtue of placing additional fiber strands in service, by virtue of increasing the capacity of Equipment already serving lit fiber strands on Phase 2 or by virtue of technology upgrades; and

(D) the provisions on notice of future lit capacity set forth in subsection (b) above shall apply to future lit capacity on Phase 2;

(ii) Company shall deliver to State on the Cutover Date for each portion of Phase 2 (except any leased lines) four dark fiber strands throughout such portion and regardless of the number of fiber strands in such portion. State shall have the exclusive ownership, control and use of the four dark fiber strands for all the purposes set forth in Section 3.4 throughout the balance of the Term. Company shall make the dark fiber strands accessible to connect to State-provided equipment located in Phase 2 huts and pedestals. Dark fiber provided hereunder shall not be included in the computation of capacity for purposes of subsection (i)(i) above;

(iii) at State's request, Company shall construct and provide to State additional Nodes on any portion of Phase 2 in locations State reasonably designates. The design of each Node shall be subject to State's written approval, which State shall not unreasonably withhold or delay, and shall include equipment huts and pedestals sufficient in size to accommodate State's current and future anticipated use. State shall pay to Company the Incremental Cost of designing and constructing each requested Node. Payment shall be subject to State's standard rules and procedures for payment for construction services, including but not limited to a 10% retention payable within 30 Days after the work is completed and accepted;

(iv) the terms and provisions of subsections (d), (g) and (h) above shall apply to each portion of Phase 2 in which State is entitled to a share of capacity under this subsection (i); provided that with respect to subsection (g) above a 10% figure shall apply to Phase 2; and

(v) if any portion of the route by which a portion of Phase 2 is electronically connected to Phase 1 consists of leased lines or facilities, State shall pay for its usage of such leased lines or facilities.

(j) Determination of Average Use. State and Company shall cooperate in good faith to develop fair and equitable means to measure and determine the State use of capacity on various Network routes and rings and the average State use of capacity to which it is entitled under subsections (a), (b) and (i) above. State and Company shall cooperate in good faith to mutually determine fair and equitable time periods over which average usage should be measured.

(k) Collocating Customer Fiber: Acquisition or Exchange of Fiber. Fiber cable installed for Collocating Customers in accordance with Section 5.11 shall not be included in determining State's share of Network capacity under this Section 3.3, unless State and Company otherwise agree in connection with any evaluation under Section 3.1(b)(ix).

(l) Multiple Fiber Types. If two or more types of fiber are included in any portion of the Network, State shall receive its share of dark fiber with respect to each type of fiber. If the foregoing allocation results in an odd whole number or fractional strands of fiber, then the odd whole number or fractional strands shall be reallocated into whole even numbers, rounding up to an even whole number of superior types of fiber if the allocation results in a number of superior types of fiber equal to or exceeding an odd whole number but less than an even whole number, and rounding down to an even whole number of superior types of fiber if the allocation results in a number of superior types of fiber greater than an even whole number but less than an odd whole number; provided that in any event State shall receive not less than one pair of the superior type of fiber. (For example, if 12 of 48 strands (i.e., 25%) are a superior type of fiber and the balance are an inferior type of fiber, then of the 10 dark fiber strands State is to receive under subsection (c) above, two shall be the superior type of fiber and eight shall be the inferior type of fiber. If 18 of 48 strands (i.e., 37.5%) are a superior type of fiber and the balance an

inferior type of fiber, then of the 10 State dark fiber strands, four shall be the superior type of fiber and six shall be the inferior type of fiber.)

Section 3.4 State Use of Network. State shall have the unfettered right to use or make available use of the Network for, and only for (a) communications by, from, to, between or among any of the agencies and entities which are eligible to participate in MNet under applicable Laws and Regulations, including but not limited to those agencies and entities described in the definition of MNet and (b) communication services for MnDOT and its Intelligent Transportation Systems. Except for uses permitted under subsections (a) and (b) above, in no event shall State use or make available use of the Network for commercial purposes.

ARTICLE IV
NETWORK PLANNING, REGULATORY APPROVALS AND PERMITS

Section 4.1 Regulatory Approvals.

(a) Except as otherwise provided in Section 4.3(b)(iv), prior to performing any construction, equipping, installation or operation of each Phase of the Network or any portion thereof, Company at its sole expense shall obtain all Regulatory Approvals necessary therefor; provided, however, that State shall not prohibit commencement of any such activity where Company and S&W have satisfied all other requirements and conditions set forth in this Agreement, including but not limited to those set forth in Section 4.2(a), and:

(i) Company lacks a Regulatory Approval from a governmental authority other than State and other than FHWA, MnDOT or other lead agency or agencies or responsible governmental authority under MEPA and/or NEPA, and is contesting diligently and in good faith the validity, applicability or terms of such Regulatory Approval through appropriate proceedings, has posted any bonds or other undertaking and has taken such other measures which may be lawfully required to commence and proceed with such activity without such Regulatory Approval and certifies in writing to State that it will obtain and abide by such Regulatory Approval if and when it is upheld; or

(ii) Company determines and State, acting reasonably, concurs that a Regulatory Approval not yet obtained is not necessary in order to commence such activity and can be expected to issue in due course during construction.

(b) Company and S&W shall prepare and submit or cause to be prepared and submitted to State all documentation and any environmental analyses required for Regulatory Approvals necessary for the design, construction, equipping, installation and operation of the Network, as contemplated by this Agreement, including but not limited to a schematic design of alternatives, with related data, which shall be deemed by State to be the functional equivalent of a Study Report, and MEPA and NEPA documents, permit applications and any supporting documents State deems appropriate. State shall provide to Company and S&W upon request all documents in State's possession relating to the foregoing, including prior MEPA and NEPA reports and other environmental documentation relating to the Network.

(c) State shall, upon Company's request and at Company's cost and expense and subject to availability of personnel, assist Company in preparing and presenting materials required to obtain any Regulatory Approvals necessary to design, construct, acquire, install and/or operate the Network.

(d) Company shall pay all charges and fees incident to obtaining Regulatory Approvals, and shall give all notices necessary and incident to acquiring or complying with Regulatory Approvals.

Section 4.2 Environmental Review and Approval.

(a) The parties anticipate that the Network as currently proposed will require preparation of an environmental assessment pursuant to MEPA and (if applicable) NEPA. Company at its sole expense shall cooperate with any lead agency or responsible agency in the gathering of information, the preparation of necessary studies, the production of necessary draft and final environmental documentation, the identification and investigation of alternatives, and the issuance of findings, decisions and approvals. Company at its sole expense also shall comply with and implement all mitigation requirements lawfully imposed as a result of any such environmental review or under any other applicable Laws and Regulations.

(b) Company's Commencement of Construction or continuation of construction of any affected portion of the proposed Network shall be expressly conditioned on, subject to and contingent upon:

(i) the satisfaction of all applicable requirements of MEPA, NEPA and section 4(f) of the Federal Highway Transportation Act ("section 4(f)");

(ii) the satisfaction by Company and the lead agency, agencies or responsible governmental units of all procedural requirements for such documents; and

(iii) the independent review by the lead agency, agencies or responsible governmental units of any environmental review documents, and the issuance of adequacy decisions, or approvals, all in accordance with applicable Laws and Regulations, and such review and appeals shall be in accordance with applicable Laws and Regulations unfettered by this Agreement.

(c) Any selection and retention of a contractor to prepare environmental documentation shall comply with all applicable Laws and Regulations, including but not limited to Council on Environmental Quality and FHWA regulations concerning conflict of interest. Unless prohibited by Law or Regulation, MnDOT shall provide Company a reasonable opportunity to comment on any proposed contractor and the contract terms before MnDOT selects and retains the contractor. If MnDOT is required to retain such contractor, Company shall pay, or reimburse MnDOT for, all fees, costs and expenses MnDOT owes to such contractor, within 30 Days after receipt from MnDOT of each invoice therefor and reasonable supporting documentation.

(d) Nothing in this Agreement creates any obligation or liability of State, MnDOT, DOA or any other instrumentality of the State, and their respective employees or agents, if in the lawful exercise of authority under MEPA and (if applicable) NEPA and section 4(f) an alternative is required other than one which materially conforms to all or part of the proposed Network; and Company and S&W hereby release State, MnDOT, DOA and other instrumentalities of the State and their respective employees and agents from any such obligation or liability.

(e) Notwithstanding the foregoing or anything in this Agreement to the contrary, Company shall have such rights as are available to it under applicable Laws and Regulations to appeal or challenge any decisions, actions or failures to act by the lead agency or responsible agency under MEPA, NEPA or section 4(f), and to the extent permitted by applicable Laws and Regulations State hereby agrees to waive the posting of any bond which may be required in connection with any such appeal or challenge.

Section 4.3 Permits.

(a) Prior to entering onto any Right of Way for the purpose of testing, sampling, surveying or investigating the Right of Way or constructing or installing any portion of the Network, Company and S&W shall apply for all necessary Permits. In general, MnDOT shall require long form Permits (i.e. Long Form No. 2525, as it may be modified, supplemented or replaced from time to time) for all construction work and installations.

(b) Company and S&W shall apply for, and MnDOT shall process applications for, Permits in accordance with the provisions of the Utility Accommodation Policy. MnDOT reserves the right to impose such conditions and requirements in Permits as it deems necessary to protect the health, safety and welfare of the public traveling on State Trunk Highways, to inspect the work, to administer the Permits and to monitor Company's and S&W's compliance with their conditions and requirements. Company and S&W shall satisfy and comply with all such conditions and requirements; provided that notwithstanding any contrary provisions of the Utility Accommodation Policy:

(i) MnDOT shall permit below-ground installations within the clear zone (as defined in the Utility Accommodation Policy) if there is no feasible alternative outside the clear zone, including locations outside the Right of Way lines, except that in no circumstances shall any below ground installations be permitted under the roadway or pavement structure (as such terms are defined in the Utility Accommodation Policy) or in the median of any divided highway;

(ii) MnDOT shall permit above ground installations within the clear zone only if:

(A) Company demonstrates to MnDOT's good faith satisfaction that despite best and diligent efforts to identify and obtain rights to a location outside the clear zone, including locations outside the Right of Way lines, there exists no reasonable possibility of obtaining such a location except at unreasonable cost;

(B) the proposed location within the clear zone and the proposed design and safety features for the above-ground installation are the best available location and design within the clear zone to protect the health, safety and welfare of the traveling public and will not interfere with or impair the present or future expansion of the roadway; and

(C) MnDOT determines in its good faith discretion that issuance of a Permit for such above ground installations at the proposed location and with the proposed design and safety features will not adversely affect the design, construction, operation, maintenance, stability or traffic safety of the Right of Way and that access for construction, operation and maintenance can be achieved other than from through traffic roadbed, loops or ramps; except that in no circumstance shall any above ground installations be permitted on the roadway or pavement structure (as such terms are defined in the Utility Accommodation Policy) or in the median of any divided highway nor shall any service connections (including connecting Equipment) be permitted from within access control limits;

(iii) Company's obligations regarding relocation of the Network shall be exclusively governed by Section 11.2; and

(iv) except for costs and expenses MnDOT incurs to enforce Permit violations or enforce correction of problems discovered in the course of MnDOT's inspection and monitoring, State shall solely bear all costs and expenses it incurs to inspect, administer, monitor, audit or reaudit the work performed under this Agreement. This provision supersedes any conflicting provision of the Utility Accommodation Policy.

(c) The absence of a condition or requirement in a Permit concerning cost reimbursement for MnDOT shall not waive or excuse any obligations of Company and S&W to pay any and all sums owing to State under this Agreement.

ARTICLE V NETWORK DESIGN AND CONSTRUCTION

Section 5.1 Network Architecture.

(a) Company and S&W shall implement a Network architecture and topology for Phase 1 which complies with and incorporates all the locations, features, elements, components, capacities and standards set forth in Exhibit A attached to this Agreement.

(b) The Network architecture and topology for Phase 1 shall create a fully integrated and interconnected communications network at the lit capacities shown in Exhibit A at each of the 13 MNet hubs (which includes the disaster recovery location) and each of the 17 MnDOT regional offices identified in Exhibit A.

(c) The Network architecture and topology for Phase 2 shall be fully integrated with the architecture, topology and operations of Phase 1 of the Network.

(d) The Network architecture and topology shall include in Phase 1 (i) interconnecting rings for the north, metro and southern regions of the State, (ii) interconnection of the rings through use of DACS or comparable technology, (iii) termination of all rings at OC-48 Nodes located in the Centennial Office Building in St. Paul, without duplicating or contending with each other, (iv) a Network operations center for centralized operation, administration, management and monitoring of the Network, (v) a Network alarm system which shall electronically monitor functioning of the Network and Equipment and identify in real time to operators at the Network operations center the source and location of any malfunctions or failures within the Network, (vi) electronic means to constantly monitor and display State's portion of Network operations at the State's communications operations center and disaster recovery site and (vii) a test bed facility.

(e) Each ring shall include at a minimum 48 strands of fiber throughout, except that (i) where rings converge or intersect, the fiber count shall equal at a minimum 48 strands times the number of rings which converge or intersect and (ii) additional fiber cable may be installed for Collocating Customers in accordance with Section 5.11.

Section 5.2 Equipment Configuration

(a) Company and S&W shall implement an Equipment configuration for Phase 1 which complies with and incorporates all the locations, types, functions and capacities of Equipment set forth in Exhibit A attached to this Agreement.

(b) Without limiting the foregoing, Company at its sole cost and expense shall procure, install, operate, administer, maintain, repair and replace all repeaters, DACS, multiplexers, SONET equipment, routers, servers, bridgers and asynchronous transfer mode equipment required by the Phase 1 Network architecture, the provisions of Exhibit A or the Plans and Specifications for the operation of Phase 1 of the Network and for interconnections with the

MNet hubs, MnDOT regional offices, the TMC and ITS applications operated by the TMC or otherwise connected at Nodes.

(c) Company may locate Equipment within State-owned buildings subject to the following terms and conditions:

(i) all such locations shall be subject to availability of space and subject to the prior written approval of and terms and conditions imposed by the State agency which owns, controls or manages the building in question;

(ii) if MnDOT or DOA owns, controls or manages the building in question, it shall not arbitrarily withhold approvals and shall limit rent or other fees for such use to \$100 per month per building at such location;

(iii) Company shall not commence construction or locate Equipment until the applicable State agency approves in writing final plans and specifications for the use;

(iv) Company shall accept the space in its "AS IS" condition, with all faults and defects, known or unknown, and without representation or warranty as to suitability or fitness for purpose or of any other kind, express or implied.

(v) Company at its sole expense shall be responsible for bringing necessary power, electricity and other utilities to the location, at its sole expense shall install separate meters and submeters to measure utility consumption and shall pay all costs of utility consumption by or for its Equipment or relating to the subject space;

(vi) State shall have no liability for any damage to or destruction of the Equipment or other property of Company, of Collocating Customers or of any other users for loss of service over the Network or Collocating Customer facilities due to any such damage or destruction, or for injury to or death of any employees, invitees, agents, contractors or representatives of Company, Collocating Customers or other users at the subject site, regardless of the negligence of State or any employee, agent or representative of State and regardless of any contrary provisions in Section 13.3 or 13.5(d) or elsewhere in this Agreement; and

(vii) State shall have the right to require relocation from such space at any time, in which case the rights and responsibilities of State and Company regarding costs of relocation shall be governed by Section 11.2(d).

Section 5.3 Design and Construction Standards.

(a) Subject to subsection (b) below, in causing or permitting the design and construction of the Network, Company and S&W shall conform to:

(i) if applicable, the environmental documents approved and design decisions made under MEPA and NEPA and any addenda and supplements thereto;

- (ii) The Network architecture and topology required pursuant to Section 5.1;
- (iii) The Equipment configuration required pursuant to Section 5.2;
- (iii) the Laws and Regulations;
- (iv) all Regulatory Approvals, including but not limited to the Permits;
- (v) the manuals, standards, criteria, requirements and procedures set forth in Exhibit B, as they may be revised from time to time;
- (vi) generally recognized cost effective advances and improvements in technology, materials and equipment applicable and available from the Equipment vendor Company and S&W select; and
- (vii) generally accepted standards and practices applicable to the design, engineering and construction professions, subject to approved deviations under subsection (c) below.

(b) The requirements set forth in subsection (a) above are subject to the following:

(i) to the extent the procedures set forth in Exhibit B vary from the procedures required to be followed under this Agreement, the procedures required to be followed under this Agreement shall control so long as Company and S&W comply with all worksite safety standards;

(ii) in accordance with the Utility Accommodation Policy, Company and S&W must obtain MnDOT's approval of the location and design of any improvements or installations on a bridge or other structure which carries a Freeway roadway or ramp;

(iii) fiber optic cable, conduit and innerducts shall be placed on a uniform alignment near the Right of Way line and buried generally at 42 inches below grade and in any event not less than 36 inches below grade, unless MnDOT grants a variance pursuant to subsection (d) below;

(iv) warning tape shall be placed a minimum depth of 12 inches below the existing grade and above the fiber optic cable, conduit and innerducts; and

(v) Company and S&W shall be responsible for all traffic control related to its work during construction and any maintenance, repair or replacement, as set forth in the Permits.

(c) Company and S&W may apply to State (through the State Project Manager) for deviations from applicable design standards or construction standards. All applications shall be in writing and shall include justification for the request, addressing safety and cost considerations. State shall have no obligation to approve any such application and Company and S&W shall bear the burden of persuading State, consistent with generally accepted engineering

practice, that the deviation sought constitutes sound and safe engineering and achieves or substantially achieves State's applicable safety, engineering and performance standards and criteria. No deviation shall exist or be effective unless and until stated in writing signed by an authorized agent of State. Within 14 Days after Company and S&W apply therefor in writing State either shall issue a written decision or shall advise Company and S&W of the date by which a decision shall be reached and shall render such decision as soon as reasonably possible. State's decision concerning the deviation shall be final, binding and not subject to any form of dispute resolution.

(d) Company and S&W may apply for approvals from State (through the State Project Manager) of interpretive engineering decisions concerning the meaning, scope, interpretation and application of the design and construction standards and procedures set forth in Exhibit B. All applications for such approvals shall be in writing. State may issue a written approval of Company's and S&W's proposed interpretive engineering decision (if any), may issue its own interpretive engineering decision or may disapprove any interpretive engineering decision Company and S&W propose. State shall use good faith efforts to respond in writing within 14 Days after State receives Company's and S&W's written application, with reasons for any disapproval clearly stated. If State is unable to issue a written approval or State's own interpretive engineering decision within 14 Days after State receives Company's and S&W's written application, State shall advise Company and S&W of the date by which a decision on interpretation will be issued and shall issue the decision on interpretation as soon as reasonably possible. Any disputes concerning interpretive engineering decisions shall be subject to resolution in accordance with Section 16.7. At State's request, evidence of State's interpretation respecting, or application of the disputed standard to, other State projects involving similar issues, as well as interpretations and applications State has made in connection with similar issues, shall be given substantial weight in resolving such dispute.

Section 5.4 Design Implementation.

(a) Company and S&W shall use design professionals licensed in the State or, if allowed by applicable Laws and Regulations, design professionals supervised by design professionals licensed in the State for designing the Network. Company and S&W shall deliver to the State Project Manager upon request proof of licensure.

(b) Company and S&W, through its design professionals, shall submit to the State Project Manager completed portions of designs and completed portions of final Plans and Specifications for the Network or applicable Construction Segment thereof, documented as being fully consistent with Section 5.3.

(c) All Plans and Specifications shall be subject to the written approval of State, which shall be based on and limited to the requirements set forth in Sections 5.3(a) and (b). If State does not provide written comments or written disapproval of a design submission within 14 Days (plus the period of any delay caused by an event of Force Majeure) after receipt of such

submission, Company and S&W may consider such submission approved and proceed with use and application of such submission, provided that:

(i) such 14 Day time limit only applies if Company and S&W include with their submission written notice to State that pursuant to this Section 5.4(c), State has 14 Days to provide written comments or written disapproval;

(ii) if State is unable to issue written comments or written disapproval within 14 Days using good faith efforts, State may extend the 14 Day period by advising Company and S&W of the date by which such comments, approval or disapproval will be issued and shall issue the comments, approval or disapproval as soon as reasonably possible but in no event more than 30 Days after receiving such written notice;

(iii) State's approval, disapproval, comment or lack thereof shall not in any way relieve the obligation of Company and S&W to satisfy the Performance Standards or to comply with all applicable Laws and Regulations, the Utility Accommodation Policy and all Regulatory Approvals; and

(iv) Section 13.1 shall continue to apply with full force and effect.

(d) Company and S&W may temporarily provide Network routing via wireless facilities in lieu of fiber optic cable, provided that:

(i) Company and S&W provide to State reasonable justifications for temporary wireless facilities;

(ii) Company and S&W agree in writing to a definite deadline reasonably acceptable to State to replace the wireless facilities with fiber optic cable;

(iii) State is satisfied that the Network with the temporary wireless facilities will continuously perform in accordance with the Performance Standards; and

(iv) State has received and approved Plans and Specifications for the wireless facilities in accordance with subsection (c) above.

(e) State shall provide a design review agent, subject to availability of State personnel and resources.

(f) At reasonable frequencies Company and S&W may request in writing that State review and comment on any design work which Company and S&W shall describe in its written request. Upon receipt of such written request, State shall cause its design review agent to deliver to Company and S&W a written statement that the agent has no actual knowledge that such design work materially deviates from or fails to comply with applicable standards set forth in Exhibit B, except as may be noted in such statement and except for deviations approved or allowed pursuant to Section 5.3(c). For purposes hereof and of any such statement, "actual

knowledge" shall be strictly limited to facts and information actually known to and present in the mind of such agent at the time such statement is given. None of State, MnDOT, DOA or such agents shall assume any liability under or arising out of such written statement or any inaccuracy thereof, except to the extent of any knowing, intentional misrepresentation. No such statement shall affect or alter the provisions of Section 13.1, 13.2 or 13.3.

(g) MnDOT and DOA shall deliver to Company and S&W upon request, and Company and S&W may utilize, all design and related work and materials MnDOT or DOA has performed or caused to be performed for the MNet, the MnDOT regional offices, the TMC or ITS applications, highways, Rights of Way, bridges, overpasses, etc. except materials protected by Laws and Regulations from disclosure. In addition, upon Company's reasonable request, MnDOT and DOA shall assist Company and S&W during the design process by providing any other pertinent information in the possession of MnDOT or DOA concerning the design, architecture, layout, locations, dimensions, operations, needs and functions of the MNet and each of its hubs (including the planned disaster recovery location), the MnDOT regional offices, the TMC or ITS applications. Such delivery and provision of work, materials and information is an accommodation only, and shall be without warranty, representation or liability whatsoever.

(h) Company and S&W shall cause to be developed and delivered to State quality control/quality acceptance manuals in accordance with good commercial practice for the work under all contracts with designers and Equipment vendors having primary responsibility for determining design or Equipment configuration, procurement or installation.

Section 5.5 Conditions to Commencement of Construction: Phase 1. In addition to the requirements and conditions under Sections 4.2(a) and (b), and except as otherwise provided in Section 5.7(c), Company and S&W shall not proceed with Commencement of Construction of the Network located within a Construction Segment of Phase 1 until the following conditions precedent are satisfied:

(a) Company has provided State with evidence acceptable to State in its good faith discretion that Company has obtained equity and/or debt financing and/or other firm and binding assurances, and that the parties providing such financing and assurances are ready, willing, able and obligated to make advances of funds, (i) sufficient to pay, as incurred all costs to design, construct, install, complete, integrate, inspect, test, and commence and carry out for at least a one year period normal operations of Phase 1 of the Network, (ii) sufficient to fund (which may be by means of firm and binding assurances) a construction contingency reserve of reasonable amount to cover all Phase 1 design and construction contingencies and risks (other than risks regarding Hazardous Substances assumed by State under Section 13.6), including risks constituting Force Majeure, (iii) sufficient to initially fund (which may be by means of firm and binding assurances) the Technology Upgrade Fund not later than the date Phase 1 commences operations, in an amount State approves pursuant to Section 12.2 and (iv) sufficient to initially fund (which may be by means of firm and binding assurances) the Maintenance Fund, in an amount State approves pursuant to Section 12.2. Further, and notwithstanding any other provision to the contrary, before S&W is obligated to commence construction, all construction funds and construction